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MICHAEL RODAK JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. .....

PRESIDENTS COUNCIL, DISTRICT 25; JEFFREY BOCHNER, by his next friend Edward Bochner; JEANY LERNER, by her next friend Lea Lerner; IRA DALY, by his next friend Bernard Daly; MARY FINNEGAN; MORRIS REICH; MYRNA SUTZ; JOSEPHINE PIZER; WALTER MICHAEL; CAROLA MICHAEL; LEA LERNER; BERNARD DALY; RUTH DALY; MERRILL YOUKELES; EVELYN SUSSMAN,

Petitioners,

—against—

COMMUNITY SCHOOL BOARD No. 25; CORMAC K. MEAGHER, individually and as Community Superintendent of Community School District No. 25,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Question Presented 2

Opinion Below 2

ARGUMENT

The petitioners have no constitutional right to compel the purchase or retention of a particular book in a public school library 6

CONCLUSION 11

TABLE OF AUTHORITIES

Cases:

Epperson v. *Arkansas*, 393 U.S. 97 (1968) 4, 6, 7, 8

Ginsberg v. *New York*, 390 U.S. 629 (1968) 7

Keefe v. *Geanakos*, 418 F.2d 359 (1st Cir., 1969) 5, 8

Mailloux v. *Kiley*, 323 F. Supp. 1387 (D. Mass., 1971), affd. 448 F.2d 1242 (1st Cir., 1971) 9

Meyer v. *Nebraska*, 262 U.S. 390 (1923) 8

Parducci v. *Rutland*, 316 F. Supp. 352 (M.D. Ala., 1970) 5, 8

Tinker v. *Des Moines School Dist.*, 393 U.S. 503 (1969) .. 4, 10

Other Authorities: PAGE

N.Y. Education Law

Section 2590-e, subd. 3 6

Section 2590-*l* 7

Section 310 7

N.Y. CPLR Article 78 7

Regulations of the N.Y. Commissioner of Education §91.1 6

"Developments in the Law—Academic Freedom," 81 HARV. L. REV. 1045 (1968) 6

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Preliminary Statement

The petitioners' civil rights complaint was dismissed, for failure to present a federal question, by the District Court for the Eastern District of New York. The Court of Appeals for the Second Circuit affirmed.

Question Presented

A book entitled *Down These Mean Streets*, by Piri Thomas, about life in East Harlem, had been purchased for the libraries in three junior high schools in Community School District 25. Following a parent's complaint as to the book's language and descriptions of heterosexual and homosexual acts, the duly elected Community School Board considered the matter and, at a public meeting, adopted a resolution directing that the book be removed from all student libraries in the district.

This lawsuit followed. Later, the Community School Board adopted another resolution, modifying the original resolution, to provide that copies of the book shall be kept at the schools which previously had the book in their libraries and that the book should be loaned directly to parents of children attending those schools, if the parents request it. Each of the petitioners is associated with one of the three schools which originally had, and still has, a copy of the book in its library.

Each side to the controversy claims professional support for its views.

Do 11 to 15 years old children attending a public junior high school, their parents, some teachers, a principal and a librarian have a constitutional right to compel retention of any particular book in the school libraries in the district?

Opinion Below

The opinion of both the Court of Appeals and the District Court are reprinted in full in the appendix attached to the instant petition (District Court at pp. 12a to 25a;

Court of Appeals at pp. 1a to 11a). Both courts found no merit to the claim that the Community School Board's resolutions violated the Constitution.

The Court of Appeals began by noting that there was no dispute as to the following: the challenged resolutions were duly adopted by the duly and legally elected Community School Board at public meetings; the selection of textbooks and other instructional material has been delegated by the Legislature of the State of New York to the Community School Board; the children in the schools affected range from 11 to 15 years of age; there are state administrative and judicial procedures available to review the actions of the Community School Board (3a-4a).*

The Court described the book and noted that (4a), "Acts of criminal violence, sex, normal and perverse, as well as episodes of drug shooting are graphically described." The Court then noted the differing opinions as to whether the book would have an adverse effect on 11 to 15 year old children (5a).

The Court found that since the responsibility for the selection of books in school libraries rests with the Community School Board, and since state administrative and judicial review procedures are available, it was not appropriate for the Court to review the wisdom of the Community School Board's determination, but only whether the Board violated any First Amendment rights (5a-6a). According to the Court (6a):

> "Since we are dealing not with the collection of a public book store but with the library of a public junior high school, evidently some authorized person or body has to make a determination as to what the library collec-

* Numbers in parentheses refer to pages of the appendix attached to the petition for a writ of certiorari.

> tion will be. It is predictable that no matter what choice of books may be made * * * some other person or group may well dissent. The ensuing shouts of book burning, witch hunting and violation of academic freedom hardly elevate this intramural strife to first amendment constitutional proportions."

Epperson v. *Arkansas*, 393 U.S. 97 (1968), where the Supreme Court struck down a statute making it unlawful for a teacher in a public school to teach or use a textbook which teaches evolution, was distinguished by the Court on two grounds: 1) The *Epperson* statute was found to be an unconstitutional aid to religion, and here there is no religious freedom question; 2) Here, unlike *Epperson*, there is no ban on the teaching of any theory or doctrine (7a). The Court noted (7a):

> "The problem of the youth in the ghetto, crime, drugs and violence have not been placed off limits by the Board. A book has been removed but the librarian has not been penalized, and the teacher is still free to discuss the Barrio and its problems in the classroom. The action of the Board does not even preclude the teacher from discussing *Down These Mean Streets* in class or from assigning it for outside reading".

Tinker v. *Des Moines School Dist.*, 393 U.S. 503 (1969), a case involving students' freedom of expression was similarly distinguished (9a). The Court also noted that in those schools which have the book, a parent may borrow it and give it to his child to read (7a).

The Court rejected the contention that, if a book is not legally obscene for purposes of sale to children by a public bookstore, it cannot be excluded from a public school library (8a). It said that such an argument, "equates the public

school library, which has a function as an adjunct to the educational venture, with the entrepreneur seller of books who has no comparable responsibility" (8a).

The Court also answered the claim that a book achieves some sort of "tenure" once it has been selected. It said that the same authority which has the power to make the initial selection clearly also has the power to remove books which become obsolete or irrelevant or were "improperly selected initially, for whatever reason" (8a-9a).

The Court noted that those cases [*Keefe* v. *Geanakos*, 418 F. 2d 359 (1st Cir., 1969) and *Parducci* v. *Rutland*, 316 F. Supp. 352 (M.D. Ala., 1970)] where the discharge of teachers for assigning certain outside reading was held to be improper, unlike the case at bar, involved the discharge of teachers and procedual due process problems and were, therefore, not in point (10a). The Court also said (10a): "To the extent that these cases hold that first amendment rights have been violated whenever a district court disagrees with the judgment of school officials as to the propriety of material assigned by a teacher to students, we are not in accord."

ARGUMENT

The petitioners have no constitutional right to compel the purchase or retention of a particular book in a public school library.

The Legislature of the State of New York has given to each locally elected community school board the power to select the books offered to students in the school libraries within its district. N.Y. Education Law § 2590-e, subd. 3. The book collection of a public school library is an important and integral part of the total education offered to public school children, and the selection of books for the collection is directly related to the instructional goals of the schools. See Regulations of the N.Y. State Commissioner of Education §91.1. The decision of the Community School Board for District 25, that a particular book ought not to be made available to children aged 11 to 15 years by the school libraries or that it should be made available (in those three libraries in its district which already possessed it) only if requested by a parent, was within its discretion and violated no constitutional right of any of the petitioners.

As this Court stated in *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968):

> "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

See "Developments in the Law—Academic Freedom," 81 HARV. L. REV. 1045, 1051-1054 (1968), cited by the Court at p. 104. The case at bar does not involve any of the elements of constitutional infirmity which have justified

the rare occurrences of judicial intervention in curriculum and school book matters.

The Community School Board exercised its considered judgment as to the suitability of *Down These Mean Streets* for 11 to 15 year old children. As noted by both courts below, the wisdom and efficacy of its judgment is subject to state administrative and judicial review procedures. See N.Y. Education Law §§2590-*l* and 310; N.Y. CPLR Article 78. The petitioners, however, suggest that the power of the Community School Board to select books for school libraries is limited to excluding those books which are legally obscene for children.

They cite *Ginsberg* v. *New York*, 390 U.S. 629 (1968). However, that case merely established that, as to sales of books to children, a different standard of obscenity from the standard for adults may be imposed on public booksellers. As stated by the Court of Appeals below, the petitioners' argument improperly "equates the public school library, which has a function as an adjunct to the educational venture, with the enterpreneur seller of books who has no comparable responsibility" (8a). If the power of selection for educational purposes is to have any meaning, it must include the power to choose between books and to exclude those which are found inadequate, irrelevant, or otherwise inappropriate for the particular children to be served, and not merely the power to exclude those books which have been held to be illegal for sale to minors.

We recognize, of course, that while the Community School Board has broad powers of selection, that power may not be abused so as to make it a means of implementing an unconstitutional state policy. In *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), state law made it a misdemeanor to teach, or use a textbook which teaches, the

theory of evolution. The Supreme Court found that the sole state policy being served by this bar was the favoring of particular religious views, and it held the law to be an unconstitutional establishment of religion. Here, in contrast, no such unconstitutional reason formed the basis of the book's exclusion.

Moreover, in *Epperson*, there was a ban not simply on a particular book's discussion of evolution, but on the entire body of literature on evolution, and there was a ban on teaching the theory as well. Cf. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). Here, there has been no restriction whatever on teaching about the Barrio or its problems. As the Court below noted (7a): "The action of the Board does not even preclude the teacher from discussing *Down These Mean Streets* in class or from assigning it for outside reading." The Board has simply decided that the book ought not to be offered to 11 to 15 year old children in their public school libraries, where they are free to take books and read them without the guidance of any teacher. The petitioners' suggestion in their brief (p. 5) that, in rejecting their claims in this case, a court would be sanctioning the actions of "school boards which systematically purged the libraries of all books advocating peace or integration, or their curricula of all courses treating the United Nations" is absurd and ignores the vastly different facts of this case.

In *Keefe* v. *Geanakos*, 418 F. 2d 359 (1st Cir., 1969) and *Parducci* v. *Rutland*, 316 F. Supp. 352 (M.D. Ala., 1970), relied upon by the petitioners, teachers were dismissed for assigning and discussing works which their supervisors found offensive. As already noted, here there has been no such restriction on teaching or assignments, and thus no violation of any teacher's academic freedom. In addition, both cases involved issues of procedural due

process not present here. See also *Mailloux* v. *Kiley*, 323 F. Supp. 1387 (D. Mass., 1971), affd. with opin., 448 F. 2d 1242 (1st Cir., 1971), a case with similar facts, where the courts relied solely on due process considerations in upholding the teacher.

Assuming arguendo that a public school librarian has any constitutionally protected right to unfettered choice in the selection of books for a public school library, the petitioner librarian here cannot possibly show the deprivation of such a right. She is employed at one of the schools which previously had *Down These Mean Streets* in its library. That library remains in possession of the book, and the librarian may lend it to parents who request it and who may, at their option, allow their children to read it. Surely such a limitation cannot be said to violate the librarian's professional freedom.

The parents of the children likewise have not been deprived of any constitutional right. Each parent in a school district will have his own views, often in direct opposition to those of other parents, as to what books are best suited for a school library's collection. The role of the elected Community School Board, acting in furtherance of its educational goals, and *in loco parentis*, is to make the choice. That a parent may disagree with that choice does not give him a constitutional right to compel the purchase or retention of any particular book, or to compel that it be available directly to students rather than to their parents.

The students have not been deprived of any "right to know." As with the teachers, there has been no ban on the discussion or teaching of any field of study or on the assignment or reading of any book. The mere fact that students in some schools will not have a particular book available to them in their school library, which is of course a library of limited space and financial resources, and

(what the petitioners ignore) a library with special educational purposes, does not deprive the students of their right to read the book, either as part of an assignment by a teacher or on their own. Nor has there been any restriction of the students' freedom to express their political beliefs or any other beliefs or ideas. Cf. *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503 (1969).

Unless the exclusion is otherwise improper, the mere fact that a book has been on the shelves and then has been excluded does not enhance the petitioners' claim of unconstitutionality. The power to select necessarily implies a continuing authority to choose new books and omit those which are no longer considered suitable. Moreover, the book was previously available in the school libraries of all the student petitioners and as to those schools the Board has directed that it be kept there and be available for loan on a parent-option basis. Such a plan, where the students have no constitutional right to have the book available at all in their school libraries, raises no constitutional issue.

A school board's judgment concerning what books are appropriate for availability in its school libraries may depend on the age of the children attending the schools. For mature children, it may be improper to exclude certain books. Yet for younger children, it may be clearly constitutionally proper to exclude the same books or place restrictions on their availability. Here the age of the children was 11 to 15. Such a group is sufficiently immature to warrant some limitation on the kind of books made freely available to them.

CONCLUSION

The petition for a writ of certiorari should be denied.

August 28, 1972.

Respectfully submitted,

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